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In the Supreme Court of the United States

OCTOBER TERM, 1996

JOHN HUDSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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73 pp

QUESTION PRESENTED

Whether the Double Jeopardy Clause bars petitioners' criminal prosecution on charges of conspiracy, misapplication of bank funds, and making false banking entries because they previously paid $44,000 in civil penalties assessed by the Comptroller of the Currency based on the same underlying conduct.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 92 F.3d 1026. The order of the district court dismissing the indictment (Pet. App. 9a-14a) is reported at 879 F. Supp. 1113. A prior opinion of the court of appeals (Pet. App. 69a-81a) is reported at 14 F.3d 536. A prior opinion of the district court (Pet. App. 82a-88a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1996. A petition for rehearing was denied on September 20, 1996. Pet. App. 18a-19a. The petition for a writ of certiorari was filed on December 17, 1996, and was granted by the Court on April 14, 1997. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the Constitution provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." Pertinent parts of the versions of 12 U.S.C. 84, 93, 375b, and 504 (1982) in effect at the time of petitioners' conduct, and of the versions of 12 C.F.R. 31.2 and 215.4 (1986) in effect at that time, are reproduced in the appendix to this brief. The provisions of 18 U.S.C. 371, 656, and 1005 (1994) under which petitioners have been indicted are also reprinted in that appendix.

STATEMENT

On August 25, 1992, petitioners John Hudson, Larry Baresel, and Jack Rackley were indicted in the United States District Court for the Western District of Oklahoma on one count of conspiracy to misapply bank funds and to make false banking entries, in violation of 18 U.S.C. 371. J.A. 9-17. In addition, the grand jury charged Hudson with 19 counts, Baresel with 15 counts, and Rackley with 17 counts of misapplication of bank funds, in violation of 18 U.S.C. 656 and 2; Rackley was also charged with two counts of making a false banking entry, in violation of 18 U.S.C. 1005. J.A. 17-38. Before trial, petitioners moved to dismiss the indictment on double jeopardy grounds. The district court initially denied the motion, Pet. App. 82a-88a, but the court of appeals reversed in part and remanded for further proceedings, *id.* at 69a-81a. On remand, the district court granted petitioners' motion to dismiss the indictment. *Id.* at 9a-14a. The court of appeals reversed. *Id.* at 1a-8a.

1. In 1986 and 1987, petitioner Hudson was the majority owner of five banks in Oklahoma, including the First National Bank of Tipton, Oklahoma, and the First National Bank of Hammon, Oklahoma. During approxi-

mately the same time, petitioner Baresel was a member of the boards of directors of the Tipton and Hammon banks, and petitioner Rackley was the president of the Tipton bank and a member of the board of directors of the Hammon bank. Pet. App. 89a-90a.

Examination and investigation of the Tipton and Hammon banks led the Office of Comptroller of the Currency (OCC) to conclude that petitioners had used their bank positions to arrange a series of bank loans to Hudson, in violation of statutes and OCC regulations restricting loans to bank insiders and imposing lending limits on loans to any one borrower.[1] OCC concluded that loans extended by the Tipton and Hammon banks nominally to third parties were in reality made to Hudson. The loans were made to enable Hudson to redeem bank stock that he had pledged as collateral on defaulted loans, and thereby to retain control of the banks. Pet. App. 90a-97a.

On February 13, 1989, OCC issued a "Notice of Assessment of a Civil Money Penalty" against petitioners. The Notice alleged that petitioners had violated 12 U.S.C. 84 and 375b and 12 C.F.R. 31.2(b) and 215.4(b) by causing the banks with which they were associated to make loans to nominee borrowers in a manner that unlawfully allowed petitioner Hudson to receive the benefit of the loans. Pet. App. 92a-93a, 94a-95a. The Notice also alleged that the nominee loans resulted in losses to the Tipton and Hammon banks of almost $900,000 and contributed to their

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[1] As pertinent here, 12 U.S.C. 84(a)(1) (1982) generally prohibited banks from extending to any one borrower unsecured loans exceeding 15% of the bank's unimpaired capital and surplus. 12 U.S.C. 375b(2) (1982) prohibited a bank from extending a loan to any of its officers or directors above lending limits set by regulation without prior approval of the bank's board of directors. Regulations of the Comptroller and the Board of Governors of the Federal Reserve System provided that loans to a bank's insiders exceeding 5% of the bank's capital and surplus required prior bank board approval. 12 C.F.R. 31.2, 215.4 (1986).

failures. *Id.* at 97a. "After taking into account the size of the financial resources and the good faith of [petitioners], the gravity of the violations, the history of previous violations and other matters as justice may require, as required by 12 U.S.C. §§ 93(b)(2) and 504(b)," OCC assessed penalties of $100,000 against Hudson and $50,000 each against Baresel and Rackley. *Id.* at 89a.

On August 31, 1989, OCC issued a "Notice of Intention to Prohibit Further Participation" against each petitioner. OCC informed petitioners of its intention to bar them from further participation in the conduct of any federally insured bank, based on the same series of nominee loans. Pet. App. 99a, 109a, 119a.

In late 1989, each petitioner resolved the proceedings initiated by the Notices filed by the Comptroller by entering into a "Stipulation and Consent Order." Pet. App. 129a-143a. In the consent orders, Hudson agreed to pay a $16,500 assessment, Baresel agreed to pay a $15,000 assessment, and Rackley agreed to pay a $12,500 assessment. *Id.* at 130a, 140a, 135a. Each petitioner also agreed not to participate in banking activities without the written authorization of the Comptroller and all other relevant regulatory agencies. *Id.* at 130a-131a, 136a-137a, 141a-142a.

2. In August 1992, petitioners were indicted in the Western District of Oklahoma on charges of conspiracy, misapplication of bank funds, and making false bank entries. The violations charged in the indictment rested on the same lending transactions that formed the basis for the prior administrative proceeding brought by OCC. Pet. App. 69a.

Petitioners moved to dismiss the indictment, arguing that their conviction on the charged offenses would result in multiple punishments, in violation of the Double Jeopardy Clause. The district court denied the motions. Pet. App. 82a-87a. The court of appeals, however, vacated

the district court's judgment in part and remanded for further proceedings to determine whether the civil money penalties assessed by OCC and settled by petitioners were punitive and therefore barred subsequent criminal punishment. *Id.* at 69a-81a. The court of appeals read *United States* v. *Halper*, 490 U.S. 435 (1989), and *Austin* v. *United States*, 509 U.S. 602 (1993), to hold that "if a sanction is not exclusively remedial, but rather can only be explained as also affecting deterrence or retribution, it is punishment for double jeopardy analysis" and therefore bars additional punishment. Pet. App. 75a. The district court was directed on remand to examine the purposes served by the civil money penalties imposed on petitioners, and the relation between the amount of the penalties and any injury sustained by the government. *Id.* at 79a-81a.[2]

3. On remand, the district court held an evidentiary hearing on the purposes served by the civil money penalties and their relation to the government's injury. Daniel Stipano, Assistant Director of the Enforcement and Compliance Division of OCC, testified that petitioners' conduct had caused a loss to the Federal Deposit Insurance Corporation (FDIC) Insurance Fund: OCC had directed the Tipton and Hammon banks to write off the Hudson-nominee loans because they had no value, and those losses (between $900,000 and $1 million), combined with other losses, rendered the banks insolvent and caused them to be placed in FDIC receivership. Because the banks' capital was depleted, the FDIC had to reach into the insurance fund to pay off depositors. Pet. App. 57a. Stipano also testified that OCC had expended about $72,000

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[2] The court of appeals itself concluded, however, that the administrative sanctions barring petitioners from participating in the affairs of a bank without OCC approval were remedial, not punitive, and therefore did not implicate the Double Jeopardy Clause at all. Pet. App. 75a-78a.

in investigation and enforcement costs in the civil case. He based that figure on his allocation of salary and benefits of OCC staff members who had investigated the Hudson-nominee loans. *Id.* at 39a-41a.

Stipano also explained that, under the relevant statute, "before we assess a civil money penalty, [OCC] is supposed to consider certain statutory factors. They cover things like the gravity of the violation, the history of previous violations, the financial resources of the individual, and other factors that justice may require." Pet. App. 27a-28a. The purpose of OCC's civil money penalties, Stipano further stated, is "to deter future violations of law or encourage the correction of existing violations." *Id.* at 36a. Stipano also testified that, at the time the civil penalties in this case were assessed, OCC's enforcement staff did not believe that OCC could order petitioners to make restitution to the banks. *Id.* at 33a. Stipano confirmed that, in assessing the penalties, he had used a "civil money penalty matrix" to evaluate 13 factors to suggest the monetary penalty that should be imposed. *Id.* at 55a; see J.A. 39.[3] Although that matrix suggested that a penalty of $100,000 against each petitioner was appropriate, see Pet. App. 55a-56a, OCC compromised the penalty in an amount less than that "proportionate to the harm,"

[3] The matrix was derived from an OCC policy statement concerning the assessment of civil money penalties. That statement in turn was derived from policies of the Federal Financial Institutions Examinations Council, which has established uniform policies for the assessment of civil penalties by all federal agencies with regulatory authority over banking and financial institutions. See Pet. App. 34a-35a. The policy statement relevant to this case was issued by OCC on January 28, 1988. That policy statement was introduced at the evidentiary hearing as Government Exhibit 21. Previous OCC policy statements were also introduced as exhibits at that hearing and are in the record.

primarily because of petitioners' limited ability to pay, *id.* at 31a-32a.

4. After the hearing, the district court dismissed the indictment. Pet. App. 9a-14a. The court first concluded that, "for double jeopardy purposes, the Consent Order[s] [that terminated the administrative proceeding] and the indictment involve the same conduct." *Id.* at 11a. The court reasoned that "[t]he broad range of conduct prohibited by 12 U.S.C. § 93(b) and § 504," the statutes authorizing OCC to assess monetary penalties, "necessarily encompasses the conduct which is the subject of 18 U.S.C. § 656," one of the three statutes under which petitioners were indicted. Pet. App. 12a.[4]

The court then considered whether "the punishment imposed under the civil penalty is sufficient to invoke double jeopardy protection against the subsequent indictment." Pet. App. 12a. "Double jeopardy," the court stated, "does not apply where the civil penalty at issue is *solely* remedial, but applies if that penalty is also partially designed to punish." *Ibid.* (citing *Austin*). The court concluded that the monetary sanctions imposed against petitioners were not "solely remedial." It explained that (a) Stipano testified that OCC had assessed a penalty against petitioners to deter future violations by others; (b) OCC's policy manual made clear that a civil money penalty can serve as a deterrent against similar violations by others; and (c) the civil money penalty matrix used to calculate the amount of the penalty included intent, number of violations, and concealment of violations as factors to be considered, but did not include injury to the government as such a factor. *Id.* at 13a-14a. The court

[4] The court did not separately state whether the prosecution or punishment of petitioners for conspiracy, under 18 U.S.C. 371, or making false banking entries, under 18 U.S.C. 1005, could also constitute double jeopardy as a second punishment for the same offense.

also stressed that OCC staff had not relied on the agency's investigative costs when it recommended the amount of the penalty to be assessed against petitioners. *Id.* at 14a. Because "[t]he evidence establishes that the OCC monetary assessments against [petitioners] were not solely remedial [but] * * * were at least partially designed to serve as a deterrent," the court found that the penalties "were punitive for double jeopardy purposes." *Ibid.*

5. The court of appeals reversed. Pet. App. 1a-8a. The court held that under the "objective test" outlined in *Halper*, *supra*, a civil assessment is not punishment "when it bears a rational relation to the goal of compensating the government for its loss." *Id.* at 4a. Here, the court held, "there was no gross disproportionality between the total fines imposed, $44,000, and the proven damages to the government, $72,000." *Ibid.*; see also *id.* at 6a ("the record in the case at bar simply does not suggest that the amount [petitioners] agreed to pay [the OCC] was overwhelmingly disproportionate to the damages [they] caused") (internal quotation marks omitted). Accordingly, the court concluded, the administrative sanctions "can fairly be characterized as remedial." *Ibid.* (internal quotation marks omitted).[5]

The court of appeals rejected the premise, on which the district court had relied, that the penalties were punitive because the "subjective intent" of the Comptroller in assessing them was to deter future violations. Pet. App. 6a. The court stated that the approach in *Halper* of comparing the amount of the penalty with the loss to the government "constitutes an objective rule that is grounded in the nature of the sanction and the facts of the particular case. It does not authorize courts to undertake a broad inquiry into the subjective purposes that may be thought to lie behind a given judicial proceeding." Pet. App. 6a (quoting *Halper*, 490 U.S. at 453 (Kennedy, J., concurring)). The court agreed with other appellate decisions that "merely because the [agency] did not consider the government's loss when imposing the fine does not imply that the fine is not related to the government's loss." *Id.* at 7a.[6]

[5] The court of appeals did not reach the government's argument that the penalties also served in part to remedy the $900,000 loss suffered by the Federal Deposit Insurance Fund.

SUMMARY OF ARGUMENT

A. Congress may ordinarily impose both a civil and a criminal sanction for the same underlying act without infringing the Double Jeopardy Clause. Where a civil money penalty qualifies as "punishment," however, the Double Jeopardy Clause bars its imposition following a criminal conviction for the same offense. *United States* v. *Halper*, 490 U.S. 435 (1989). *Halper* does not apply here. The civil money penalties previously imposed on petitioners for their banking violations constitute a nonpunitive, regulatory sanction. Accordingly, the subsequent prosecution of petitioners for crimes does not violate the Double Jeopardy Clause.

In *Halper*, the Court announced a rule for the "rare case," in which a fixed civil penalty designed to compensate the government for fraud produces, on particular facts, an "overwhelmingly disproportionate" sanction. 490 U.S. at 449. *Halper* does not apply to civil money penalties imposed for the purpose of inducing compliance with regulatory objectives. Civil money penalties assessed under a regulatory scheme aim to deter violations, and thereby to promote the public interest. The size of such penalties is calibrated to achieve their conduct-shaping

[6] Because the court found that civil penalties were not punishment, it declined to reach the government's argument that the violations for which the penalties were assessed did not involve the "same offense" as the criminal charges. Pet. App. 3a n.3.

purposes. The *Halper* test was not framed, and is not applicable, to such conduct-shaping sanctions. Twice since *Halper*, the Court has declined to apply that decision's test outside the context of a fixed penalty imposed for a compensatory purpose. *Department of Revenue* v. *Kurth Ranch*, 511 U.S. 767, 784 (1994); *United States* v. *Ursery*, 116 S. Ct. 2135, 2145 (1996). And *Ursery* concluded that *Halper*'s "case-specific approach [is] impossible to apply outside the context of a fixed civil-penalty provision." *Id.* at 2146.

The conduct-shaping, or deterrent, purpose of regulatory civil money penalties does not mark such sanctions as "punishment" under the Double Jeopardy Clause. This Court has recognized that deterrence is a legitimate, nonpunitive aim of civil sanctions. *Ursery*, 116 S. Ct. at 2148; *Kurth Ranch*, 511 U.S. at 779-780. Deterrence does not have a retributory, stigmatizing character that would qualify civil money penalties as punishment. For double jeopardy purposes, a regulatory civil monetary penalty is a legitimate, nonpunitive means of influencing conduct.

The long history of civil money penalties enacted for deterrent purposes, and the pervasive presence of such sanctions in the civil law today, buttresses that conclusion. A holding that a deterrent purpose characterizes such sanctions as "punitive" under the Double Jeopardy Clause would radically transform the enforcement of the law. The parallel pursuit of civil penalties and criminal prosecution is commonplace under federal regulatory schemes. If the Double Jeopardy Clause were held to require an election by the government between those approaches, the enforcement of the law would be seriously skewed and hampered.

The appropriate test to determine whether regulatory civil money penalties qualify as "punishment" for double jeopardy purposes inquires, first, whether Congress intended to impose a civil sanction, and, second, whether

the sanction is so punitive in purpose or effect as to negate Congress's intention to establish a civil regulatory scheme. See *Ursery*, 116 S. Ct. at 2147; *United States* v. *Ward*, 448 U.S. 242, 248-249 (1980). Application of that test here establishes that civil money penalties imposed pursuant to regulatory schemes are, as a general matter, not punishment under the Double Jeopardy Clause. Accordingly, petitioners' prior payment of civil money penalties does not bar their prosecution.

B. Even if it were appropriate to apply *Halper*'s case-specific test to the civil money penalties in this case, that test would not assist petitioners. Under *Halper*'s test, a civil money penalty is punitive only if it is not rationally related to the harms caused by the underlying violation. Here, the $44,000 in civil penalties paid by petitioners is less than the government's costs of investigating their violations. Thus, the penalties are remedial within the meaning of *Halper*.

The government may recoup its investigative costs even though those costs were not a factor in assessing the level of civil money penalties. The *Halper* inquiry is an objective one, which turns on the government's actual costs. To disregard those costs would give petitioners a double-jeopardy windfall, for the actual penalty imposed in this case did nothing more than compensate the government for its harm. And the government is entitled to recoup its investigatory costs even if it was not a direct pecuniary victim of the violation. When the government must expend resources to detect regulatory violations and obtain compliance with regulatory standards, the government may seek a remedy that, by recovering its investigatory costs, makes itself whole.

C. The Double Jeopardy Clause is inapplicable here for a further reason: the constitutional requirement of a former "jeopardy" is not met by a prior civil money sanction. Rather, it is met only by a prior criminal prosecu-

tion. Because petitioners did not face prosecution in the civil money penalty proceeding, the Double Jeopardy Clause does not bar a criminal indictment.

Even if payment of a prior civil money penalty could support a double jeopardy claim under *Halper*, such a civil penalty should not lead to dismissal of a criminal indictment. A *Halper* claim involves a threat of multiple *punishments*, not successive *prosecutions*. Here, giving a defendant "credit" for his civil money penalty against any eventual criminal sentence adequately protects the defendant's interest in avoiding multiple punishment. At the same time, a credit approach vindicates society's compelling interest in having one opportunity to prosecute an individual for crimes.

D. Finally, petitioners' double jeopardy rights are not violated because the civil violations and criminal charges are not the "same offense." The determination of whether the two proceedings involve the "same offense" for purposes of the Double Jeopardy Clause is governed not by a "same conduct" or "same transaction" test, but by the test of *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932). Under that test, two offenses are not the "same" if "each [offense] requires proof of a fact which the other does not." *Ibid.* Here, because all of the criminal provisions contain elements of proof beyond those required by the civil provisions, and *vice versa*, petitioners do not face multiple punishments for the "same offense."

ARGUMENT

THE DOUBLE JEOPARDY CLAUSE DOES NOT BAR PETITIONERS' PROSECUTION FOR CRIMES ARISING OUT OF THE MISCONDUCT FOR WHICH THEY PREVIOUSLY PAID CIVIL MONEY REGULATORY PENALTIES

The Double Jeopardy Clause provides that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb." While the "primary evil to be guarded against is successive prosecutions," *Schiro* v. *Farley*, 510 U.S. 222, 230 (1994), the Court has also construed the Clause to bar "successive punishments." *United States* v. *Ursery*, 116 S. Ct. 2135, 2139 (1996); *United States* v. *Dixon*, 509 U.S. 688, 696 (1993). Civil statutes do not define "offenses," see *Kansas* v. *Hendricks*, 117 S. Ct. 2072, 2086 (1997), and a civil proceeding does not place the defendant in jeopardy within the accepted constitutional meaning of that term. See *Breed* v. *Jones*, 421 U.S. 519, 528 (1975). Ordinarily, therefore, Congress may impose both a civil and a criminal sanction for the same conduct, and such cumulative sanctions do not intrinsically violate the defendant's double jeopardy rights, see *Helvering* v. *Mitchell*, 303 U.S. 391, 399 (1938), even when the civil sanction has some punitive effect. *Ursery*, 116 S. Ct. at 2145 n.2. In a "rare case," however, this Court has found that a civil sanction may impose "punishment" sufficient to implicate the Double Jeopardy Clause's proscription against multiple punishments. *United States* v. *Halper*, 490 U.S. 435, 451 (1989) (after imposition of a criminal penalty, the government may not "bring a separate civil action based on the same conduct and receive a judgment that is not rationally related to the goal of making the Government whole").

Petitioners in this case claim the benefit of *Halper*'s rule. After collectively paying $44,000 to settle civil penalty assessments for banking violations, petitioners were indicted on criminal charges growing out of the same underlying events. Relying on *Halper*, petitioners argue that their indictments must be dismissed because (they argue) they were "punished" a first time when they paid civil money penalties, and so the government is now barred from seeking to punish them a second time by imposing any criminal sanction against them. Properly understood, however, the civil money penalties paid by petitioners do not constitute "punishment" that triggers double jeopardy protection under *Halper*. And neither that case nor other principles of double jeopardy law support petitioners' request for relief from all efforts to prosecute them for the same conduct involved in the regulatory penalty proceeding. If petitioners' argument were accepted, it would radically change the relationship between civil and criminal sanctions, by forcing an election between them and hampering the flexible use of civil money penalties in regulatory schemes. The Double Jeopardy Clause has never been thought to restrict the government's enforcement options in such a drastic manner.

A. CIVIL MONEY PENALTIES IMPOSED TO DETER REGULATORY VIOLATIONS DO NOT CONSTITUTE PUNISHMENT UNDER THE DOUBLE JEOPARDY CLAUSE

1. This Court's narrow holding in *Halper* announced "a rule for the rare case," in which a fixed-penalty provision, in a particular instance, produces a sanction "overwhelmingly disproportionate to the damages [the violator] caused." 490 U.S. at 449. *Halper*'s holding does not establish that the different kind of civil penalty imposed in this case—a money penalty designed to encourage

compliance with regulatory requirements—constitutes "punishment" for double jeopardy purposes.

In *Halper*, the defendant was first criminally prosecuted and convicted of violating the false claims statute, 18 U.S.C. 287 (1982), by submitting 65 inflated Medicare claims that each charged $12 for a $3 procedure. He was sentenced to two years' imprisonment and fined $5,000. 490 U.S. at 437 & n.2. The government later sought civil sanctions based on the same inflated claims under 31 U.S.C. 3729-3731 (1982), a "fixed-penalty-plus-double-damages provision[]" of the type that "in the ordinary case * * * can be said to do no more than make the Government whole." 490 U.S. at 449. For each violation, the statute required a penalty of $2,000, an additional amount equal to twice the government's damages, and the costs of the civil action. *Id.* at 438. Because Halper had violated the statute 65 times, he "appeared to be subject to a statutory penalty of more than $130,000." *Ibid.* The district court refused to enter judgment in that amount, on the theory that a penalty "more than 220 times greater than the Government's measurable loss qualified as punishment which, in view of Halper's previous criminal conviction and sentence, was barred by the Double Jeopardy Clause." *Id.* at 439-440. On the government's appeal, this Court agreed with the district court's conclusion. The Court emphasized that it was announcing a "rule for the rare case, * * * where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." *Id.* at 449.

Halper holds that when a civil money penalty is intended only to give the government "rough remedial justice," 490 U.S. at 446, a monetary penalty that far exceeds approximate compensation of the government's loss may be presumed to be punitive because it has "no rational relation" to the penalty's remedial goal. *Id.* at 449. That holding does not apply to a civil penalty scheme designed

primarily to encourage compliance with a regulatory regime. In that situation, the penalty scheme is fashioned to deter violations, and the size of the penalty may not correspond to actual pecuniary injury at all. Rather, the penalty may be based on a host of other factors, including the importance of the governmental interest at stake, the difficulty of detecting the violation, the magnitude of the potential injury, and the resulting need to deter the violation. The *Halper* test was not designed to determine whether such a conduct-shaping penalty is punitive for double jeopardy purposes.[7]

Since *Halper* was decided, the Court has twice concluded that its rule did not provide the proper analysis for deciding whether particular civil sanctions imposed punishment. In *Department of Revenue* v. *Kurth Ranch*, 511 U.S. 767, 784 (1994), the Court held that a state dangerous-drug tax imposed on a defendant who had already been convicted on narcotics charges was the "functional equivalent of a successive criminal

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[7] The *Halper* test has no literal application to a penalty imposed for a conduct-shaping purpose: while *Halper* requires a comparison between the economic harm to the government and the size of a compensatory civil penalty, 490 U.S. at 449-450, a penalty imposed for regulatory purposes may not correspond to economic harm to the government at all. Nor would it be easy to fashion a rule in this setting analogous to *Halper*, under which courts would decide on a case-by-case basis whether the penalty was "rationally related" (*id.* at 451) to a civil sanction's *deterrent* purpose.

At the same time, a particular penalty imposed under such a regulatory scheme may in fact be justifiable as a recoupment of the government's costs of investigating the violation. When such a relationship between penalty and "damages" exists, a defendant has no basis for claiming that *his* sanction amounts to punishment for purposes of the Double Jeopardy Clause. See pp. 31-35, *infra*. But such a case-by-case inquiry under *Halper* is generally not necessary to conclude that civil regulatory penalties are not punitive for double jeopardy purposes.

prosecution" that violated the Double Jeopardy Clause. The Court, however, found *Halper*'s test for civil penalties inapplicable because tax statutes "serve a purpose quite different from civil penalties, and *Halper*'s method of determining whether the exaction was remedial or punitive simply does not work in the case of a tax statute." *Id.* at 784 (internal quotation marks omitted); see also *id.* at 786 (Rehnquist, C.J., dissenting) ("the purpose of a tax statute is not to recover the costs incurred by the Government for bringing someone to book for some violation of law, but is instead either to raise revenue or to deter conduct, or both").

Similarly, in *United States* v. *Ursery*, 116 S. Ct. 2135 (1996), the Court rejected an effort to apply *Halper* outside its context. In that case, the respondents contended that *in rem* civil forfeiture judgments against cash and property seized from them imposed punishment for the criminal activity that provided the basis for the forfeiture. The Court held that *Halper* has no application to civil forfeitures:

> Forfeitures serve a variety of purposes, but are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct. Though it may be possible to quantify the value of the property forfeited, it is virtually impossible to quantify, even approximately, the nonpunitive purposes served by a particular civil forfeiture. Hence, it is practically difficult to determine whether a particular forfeiture bears no rational relationship to the nonpunitive purposes of that forfeiture. Quite simply, the case-by-case balancing test set forth in *Halper*, in which a court must compare the harm suffered by the Government against the size of the penalty imposed, is inapplicable to civil forfeiture.

Id. at 2145.

The decisions in *Kurth Ranch* and *Ursery* establish that *Halper*'s case-by-case test is not the exclusive means to determine whether a civil sanction is "punitive" in character. Indeed, the Court stated in *Ursery* that *Halper*'s "case-specific approach [is] impossible to apply outside the context of a fixed civil-penalty provision." 116 S. Ct. at 2146. *Ursery* and *Kurth Ranch* also make clear that *Halper* did not establish the broad rule, put forward by petitioners (Pet. Br. 15, 17), that a civil sanction is always "punishment" unless it is imposed to remedy ascertainable financial harm to the government. Civil sanctions have a variety of purposes, and the double jeopardy analysis must be tailored to the nature of the sanction at issue. The goal of compensating the government for pecuniary loss is one nonpunitive goal. But so is the goal of compelling disgorgement of the fruits of wrongdoing.[8] Likewise, the goal of achieving regulatory objectives by "motivating future behavior"—*i.e.*, "discourag[ing] conduct that the government wishes to discourage and encourag[ing] conduct that it wishes to encourage"[9]—may also be nonpunitive.

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[8] In *Ursery*, 116 S. Ct. at 2148-2149, the Court characterized as "nonpunitive" the "goal of ensuring that persons do not profit from their illegal acts." The lower courts have likewise consistently held that a civil penalty that requires the defendant to part with the proceeds of his illegal conduct does not constitute punishment for double jeopardy purposes. See *United States* v. *Gartner*, 93 F.3d 633, 635 (9th Cir.), cert. denied, 117 S. Ct. 624 (1996); *Smith* v. *United States*, 76 F.3d 879, 882 (7th Cir. 1996); *United States* v. *Fields*, 72 F.3d 1200, 1209 (5th Cir.), cert. denied, 117 S. Ct. 48 (1996); *United States* v. *Carson*, 52 F.3d 1173, 1182-1183 (2d Cir. 1995), cert. denied, 116 S. Ct. 934 (1996); *SEC* v. *Bilzerian*, 29 F.3d 689, 696 (D.C. Cir. 1994).

[9] C. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 Colum. L. Rev. 1435, 1456 (1979).

Civil money penalties are frequently employed by Congress (and have always been employed in our legal system, see pp. 21-24, *infra*) for such a conduct-shaping purpose. The fact that a conduct-shaping purpose, which may appropriately be referred to as "deterrence," animates a civil money penalty provision does not require the conclusion that the civil penalty imposes "punishment" within the meaning of the Double Jeopardy Clause. Although language in *Halper* suggested that a sanction that even in part serves the goals of retribution or deterrence is punishment, 490 U.S. at 448, this Court expressly rejected that suggestion in later decisions. In *Ursery*, the Court explicitly stated that a civil sanction may punish in part without triggering the Double Jeopardy Clause. 116 S. Ct. 2146 n.2.[10] And in three cases, the Court has held that a

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[10] As the Court explained in *Ursery*,

> Whether a particular sanction "cannot fairly be said *solely* to serve a remedial purpose" [*Halper*, 490 U.S. at 448; emphasis added in *Ursery*] is an inquiry radically different from that we have traditionally employed in order to determine whether, as a categorical matter, a civil sanction is subject to the Double Jeopardy Clause. Yet nowhere in *Halper* does the Court purport to make such a sweeping change in the law, instead emphasizing repeatedly the narrow scope of its decision. * * * If the "general rule" of Justice [Stevens' dissenting opinion] were applied literally, then virtually every sanction would be declared to be a punishment; it is hard to imagine a sanction that has no punitive aspect whatsoever. Justice [Stevens'] interpretation of *Halper* is both contrary to the decision itself and would create an unworkable rule inconsistent with well-established precedent.

116 S. Ct. 2146 n.2. The reading of *Halper* suggested by Justice Stevens in his separate opinion in *Ursery* (116 S. Ct. at 2156)—that any civil sanction that is not solely remedial but is in part "deterrent or retribution" constitutes punishment for double jeopardy purposes—is the test endorsed by petitioners in this case (see Pet. Br. 18-19). As the passage quoted above indicates, however, that reading of *Halper* was rejected by the Court in *Ursery*.

civil sanction may "serve[] a deterrent purpose distinct from any punitive purpose." *Ursery*, 116 S. Ct. at 2149; *Bennis* v. *Michigan*, 116 S. Ct. 994, 1000 (1996) (same); *Kurth Ranch*, 511 U.S. at 779-780 (even an "obvious deterrent purpose" is insufficient to conclude that a tax constitutes "a form of punishment"). The conclusion that a deterrent purpose may be "distinct from any punitive purpose" is fully applicable to civil money penalties that support regulatory schemes.[11]

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[11] What does define a penalty as punishment for the purposes relevant here is an overriding goal of retribution—the purpose to attach a stigma or blame to one for having transgressed society's laws. See C. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 Geo. L.J. 775, 803-813 (1997); C. Diver, *supra*, 79 Colum. L. Rev. at 1456 & nn. 133, 136; M. Cheh, *Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 Hastings L.J. 1325, 1357 (1991); see also *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 189-190 (1963) (Brennan, J., concurring); *United States* v. *Lovett*, 328 U.S. 303, 324 (1946) (Frankfurter, J., concurring). That punitive purpose, which is absent from OCC's penalty scheme, must be distinguished from deterrence, even though both are coupled in some legal sanctions, such as a criminal conviction and sentence.

The Court has stated that "[r]etribution and deterrence are not legitimate nonpunitive governmental objectives," *Bell* v. *Wolfish*, 441 U.S. 520, 539 n.20 (1979); *Halper*, 490 U.S. at 448, and has described the "traditional aims of punishment" as "retribution and deterrence," *Mendoza-Martinez*, 372 U.S. at 168. The Court has not held, however, that deterrence by itself, unaccompanied by the goal of retribution, attachment of stigma, or the like, constitutes "punishment" in the sense relevant here. Deterrence and retribution, together, may constitute punishment; but that does not mean that deterrence by itself is also necessarily punishment. See *Halper*, 490 U.S. at 448 (punishment serves "the twin aims" of retribution and deterrence). Although the Court in *Halper* stated that a civil sanction that serves "*either* retributive or deterrent purposes" is punishment, *ibid.* (emphasis added), that use of the disjunctive was unnecessary to the decision in the case, and the Court in *Ursery* described that locution in *Halper* as

2. History further undermines any suggestion that civil money penalties imposed for regulatory violations should be deemed inherently punitive for double jeopardy purposes. Legislatures have long employed civil money penalties to deter violations of law. Yet there is no tradition that such civil penalties are tantamount to punitive criminal proceedings, or that the government must elect between a civil action to recover a penalty and a criminal prosecution to punish an offense.

Beginning in at least the 15th Century, Parliament enacted regulatory statutes, the violation of which carried monetary penalties.[12] By the late 18th Century, at least 200 English statutes carried monetary penalties for violations; those statutes regulated diverse subjects such as liquor sales, labor, smuggling, highway traffic, Sabbath observance, gambling, and disorderly conduct. See F. Frankfurter & T. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial By Jury*, 39

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dictum. 116 S. Ct. at 2145 n.2. See also *Atlas Roofing Co.* v. *OSHRC*, 518 F.2d 990, 1002 (5th Cir. 1975) (statute is not punitive if it seeks to promote "a kind of prospective deterrence [or] a means to encourage compliance with the government regulation"), aff'd, 430 U.S. 442 (1977).

[12] See II Hen. VII ch. 17 ("That no Man take any Ayrer Faulcon, Goshawk * * * upon Pain of Ten Pounds, the one Half thereof to the Party that will sue for the same by Action of Debt, by Examination befor the Justices of the Peace, Information, or otherwise, and the other Half to the King."). Earlier English law had developed two forms of monetary penalties payable to the Crown: amercements and fines. Amercements generally could be recovered through an action for debt, whereas fines were paid to avoid imprisonment on a criminal matter. See 2 F. Pollock & W. Maitland, *The History of English Law Before the Time of Edward I*, at 510-519 (1968); 2 *Bracton on the Laws and Customs of England* 329-333 (S. Thorne trans. 1968); 3 W.S. Holdsworth, *A History of English Law* 435 (1923). Amercements eventually fell into disuse, and were replaced by civil penalties; the use of the fine in criminal proceedings continued. 3 W. Blackstone, *Commentaries on the Laws of England* 375 (1768).

Harv. L. Rev. 917, 928-929 (1926). Typically, civil-penalty statutes could be enforced through civil actions for debt brought by private parties, with part of the recovery going to the Crown, rather than through proceedings with the hallmarks of criminal prosecutions. See 2 W.S. Holdsworth, *A History of English Law* 367 (1923).[13] Blackstone explained that civil penalties for statutory violations were recoverable in actions for debt on the theory that statutory regulations were analogous to terms of a contract with society, and the money penalties were analogous to liquidated damages for breach of the contract. 3 W. Blackstone, *Commentaries on the Laws of England* 159 (1768). We are aware of no evidence that, at English common law, an action for such penalties was thought to constitute a "jeopardy" that would bar subsequent prosecution for the same underlying conduct.

In this country, colonial legislatures enacted hundreds of statutes carrying civil penalties for violations, and similar statutes were enacted by the legislatures of the early state governments. See F. Frankfurter & T. Corcoran, *supra*, at 983-1019 (appendices). In its first ten years, Congress enacted at least 37 statutes carrying civil penalties.[14] Faced with claims that those penalties could only be collected through criminal proceedings, the courts uniformly sustained the use of civil proceedings to recover monetary penalties for statutory violations, even while noting the deterrent nature of the penalty provisions. See *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320 (1909) (upholding delegation to administrative officers of the authority to set the amount of a deterrent civil penalty for the violation of an immigration law); *Hepner* v. *United*

[13] The king could also bring the suit himself, in which case the Crown would recover the entire penalty. 4 W. Blackstone, *supra*, at 160.

[14] Those statutes are collected in Appendix A, *infra*, 1a-4a.

States, 213 U.S. 103 (1909) (upholding use of a directed verdict in favor of the United States in a civil action to recover deterrent penalties for illegally importing aliens); *Passavant* v. *United States*, 148 U.S. 214, 221 (1893) (upholding delegation to administrative officers of power to set penalty for importers' undervaluation of goods, and noting that the penalty was "designed to discourage undervaluation"); *Stockwell* v. *United States*, 80 U.S. (13 Wall.) 531, 543 (1871) (holding that the government could bring a civil action to recover penalties in the amount of double the value of goods illegally imported into the United States, even though "an indictment or information [for the same violation] might be sustained").

That history indicates that civil penalties have always been deployed, not only for compensatory purposes, but also as sanctions for violations of law. See *Tull* v. *United States*, 481 U.S. 412, 422-423 (1987). That purpose continues to be served by contemporary civil penalty provisions. A comprehensive 1979 survey of civil money penalty provisions enforced by federal agencies found "some 348 statutory civil penalties enforced by 27 federal departments and independent agencies," which provisions were authorized for "the enforcement of a host of regulatory commands." C. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 Colum. L. Rev. 1435, 1438 (1979). The civil penalty provisions typically permitted assessment based on factors such as the nature, extent, and seriousness of the violation, the degree of participation of the violator, the violator's ability to pay, "and such other matters as justice may require." *Id.* at 1441. The lengthy pedigree and pervasiveness of "deterrent" civil penalty provisions in federal law casts significant doubt on petitioners' apparent view that all such penalties, regardless of amount, are so punitive as to be the "rare case" contemplated by the *Halper* Court.

Such an extension of *Halper* could seriously impair the government's ability to protect the integrity of its regulatory schemes. The thrust of petitioners' contention is that, because the civil penalties they paid were not intended to compensate the government for any actual pecuniary loss but were imposed to achieve deterrence, those penalties must, under *Halper*, be understood as "punishment," with the effect of foreclosing any and all efforts to punish through the criminal law. See Pet. Br. 12-13, 19-21. Petitioners appear to take that view regardless of the size of the penalties imposed, or of the public interests at stake. But dual civil money-penalty and criminal enforcement schemes are, and always have been, common in the law. See *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 555 (1943) (Frankfurter, J., concurring) ("[L]egislation of this character, providing two sanctions for the same misconduct, enforceable in separate proceedings, one a conventional criminal prosecution, and the other a forfeiture proceeding or a civil action as upon a debt, was quite common when the Fifth Amendment was framed by Congress."). If the deterrent component to regulatory civil money penalties invariably marked them as "punitive" under *Halper*, then the government would be forced to elect between a civil and criminal remedy whenever it uncovered a course of conduct that violated both civil and criminal provisions.

That forced election could in many cases skew the fair enforcement of the law. For example, the government might initially impose a modest civil penalty against a violator but later discover, through further investigation, that the violations were intentional and were more severe than previously thought. Under petitioners' rule, the government would be barred from criminal prosecution, and the wrongdoers would escape an appropriate punishment for their offense. Conversely, petitioners' rule might lead the government to forgo civil penalties because

of concerns that their assessment would immunize a party from possible criminal punishment in the future, no matter how deserved. But that result, too, would be contrary to the public interest, for it would hamper regulators in applying the flexible civil penalty schemes that Congress provided to enforce the regulatory programs it created.

3. All the foregoing factors—the self-consciously narrow holding of *Halper*, the limitations recognized in later cases, the long history of civil regulatory penalties, and the practical difficulties that would flow from extending *Halper* to this setting—suggest that *Halper*'s case-by-case test does not apply unless the civil penalty at issue is intended principally to provide recompense for pecuniary losses caused by the defendant, but appears grossly disproportionate to that end. That is not the case here. Rather, the punitive or nonpunitive character of the regulatory penalties at issue in this case is better assessed by consideration of the nature and character of the sanctions as a categorical matter. Here, as in *Ursery* (116 S. Ct. at 2147), "a useful analytical tool" for assessing whether the civil penalties imposed on petitioners constitute "punishment" is the two-part test of *United States* v. *Ward*, 448 U.S. 242, 248-249 (1980). That test inquires, first, whether Congress intended to establish a civil, rather than a criminal sanction, and second, if Congress has indicated an intention to establish a civil penalty, "whether the statutory scheme [is] so punitive either in purpose or effect as to negate Congress' intention." *Ibid.*; see also *Ursery*, 116 S. Ct. at 2141-2142. While that inquiry may not exhaust the double jeopardy analysis in all cases, it will suffice in all but the most extreme ones.[15]

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[15] In *Ward* and in *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354 (1984), the Court applied that two-part test to determine whether the imposition of a particular sanction "was intended as

As to the first inquiry, Congress clearly intended the money penalties imposed on petitioners to be civil sanctions. OCC assessed penalties on petitioners pursuant to 12 U.S.C. 93 and 504 (1982) for violations of 12 U.S.C. 84 and 375b (1982), respectively, and implementing regulations. Before its amendment in 1989, Section 93 provided for the imposition of a "civil money penalty" on banks and bank officers who violated any of several banking-law provisions, including Section 84, and authorized the Comptroller to impose "a civil money penalty of not more than $1,000 per day for each day during which [the] violation continues." 12 U.S.C. 93(b) (1982). Similarly, before its 1989 amendment, Section 504, titled "Civil penalty," provided for imposition of monetary penalties against any bank or bank officer that violated any of several sections of Title 12, including Section 375b. 12 U.S.C. 504(a) (1982). Neither provision defined an offense or provided criminal enforcement mechanisms, and both provisions formed part of "a complete system for the establishment and government of national Banks," *Cook County National Bank* v. *United States*, 107 U.S. 445, 448 (1883), "for the protection of the bank's depositors and other creditors." *Deitrick* v. *Greaney*, 309 U.S. 190, 194 (1940).

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punishment, such that the proceeding is essentially criminal in character." *Id.* at 362. A determination that a particular sanction is "civil" rather than "criminal" under the *Ward/89 Firearms* test may not always dispose of the double jeopardy multiple-punishments issue; the Court in *Halper* declined to rely on the "label[]" attached to a proceeding by application of the *Ward* test, but went on to evaluate the sanction as applied in a particular case. *Halper*, 490 U.S. at 447. Here, however, as in *Ursery*, a conclusion that a monetary penalty imposed in a regulatory scheme is "civil" under the *Ward* test does show that the penalty is neither "punishment" nor "criminal" for purposes of the Double Jeopardy Clause. *Ursery*, 116 S. Ct. at 2148.

As to the second inquiry, the Court has required the "clearest proof" to conclude that a "statutory scheme [is] so punitive either in purpose or effect" as to negate Congress's intention to establish a civil, regulatory scheme. *Ward*, 448 U.S. at 248-249. In making that assessment, the Court has looked for "guidance" to a list of factors set forth in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), and subsequent cases.[16] Those *Mendoza-Martinez* factors show that the civil penalties in this case were not punitive, let alone *so* punitive as to require setting aside Congress's intention to create a civil, regulatory sanction.

First, the monetary penalties do not involve an affirmative disability or restraint, such as imprisonment.[17] Second, civil penalties have not historically been regarded

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[16] "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions." *Mendoza-Martinez*, 372 U.S. at 168-169; see also *Ursery*, 116 S. Ct. at 2148-2149; *United States* v. *Salerno*, 481 U.S. 739, 747 (1987); *Schall* v. *Martin*, 467 U.S. 253, 269 (1984); *89 Firearms*, 465 U.S. at 365; *Ward*, 448 U.S. at 249-251; *Wolfish*, 441 U.S. at 537-538.

[17] Petitioners seek to augment their showing that they suffered punishment by relying on their debarment from further participation in the banking industry. Pet. Br. 21, 32. It is settled, however, that debarment is a purely remedial sanction designed to protect a regulated industry. See *Helvering* v. *Mitchell*, 303 U.S. at 399 & n.2 ("debarment" is a remedial sanction); *United States* v. *Rusk*, 96 F.3d 777, 778-779 (5th Cir. 1996) (collecting cases). And the fact that petitioners may no longer be in a position to commit further violations does not convert the deterrent impact of the civil penalties into punitive sanctions.

as punishment. To the contrary, "the payment of fixed or variable sums of money [is a] sanction[] which ha[s] been recognized as enforcible by civil proceedings since the original revenue law of 1789." *Helvering* v. *Mitchell*, 303 U.S. at 400; see also pp. 21-24, *supra*. Third, the provisions under which the penalties were assessed, 12 U.S.C. 93 and 504, do not come into play only on a finding of *scienter*; a civil money penalty may be assessed against on any person or bank "who violates" any of the underlying banking statutes, without regard to the violator's state of mind. See pp. 45-46, *infra*.

Fourth, although the penalties promote deterrence, one of the "twin aims" of punishment (*Halper*, 490 U.S. at 448), deterrence, by itself, is not an inherently punitive purpose. Because deterrence is as consistent with civil, regulatory goals as it is with punishment, even a penalty with a predominantly deterrent aspect does not necessarily have the character of punishment. See pp. 19-20, *supra*. Petitioners contend (Br. 24-25) that the factors that OCC must, by statute, consider in setting the amount of the penalty—"the appropriateness of the penalty with respect to the size of the financial resources and good faith of the * * * person charged, the gravity of the violation, the history of previous violations, and such other matters as justice may require"—show that the civil penalties are punitive, because they require a focus on a violator's culpability and his individual circumstances. But a civil penalty does not become punitive simply because Congress links the size of the penalty to the violator's culpability or his ability to pay.[18] Adjustment of a civil penalty based

[18] In *Helvering* v. *Mitchell*, for example, the penalty at issue depended solely on whether the defendant engaged in "fraud with intent to evade tax," yet this Court held that it was a "civil administrative sanction." 303 U.S. at 405-406. And in *Ward*, as in this case, the penalty provision provided that in determining the amount of the penalty, the government was to consider "the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation." 448 U.S. at 245. This Court nevertheless found the evidence that the statute had a "punitive purpose or effect" to be "quite weak." *Id.* at 254.

on the gravity of a violation or the violator's culpability is fully consistent with the non-punitive aspect of deterrence. Grave violations warrant greater deterrence than technical ones, and intentional disregard of regulations may require stronger deterrence than inadvertent errors. See C. Diver, *supra*, 79 Colum. L. Rev. at 1457-1463. And factors intended by Congress to mitigate the impact of penalties in particular cases (such as reductions because of the offender's diminished ability to pay) cannot render a penalty provision punitive overall.

Fifth, conduct sufficient to trigger a civil penalty under Sections 93 and 504 may be, but is not necessarily, criminal. For example, a banking officer may be subject to a penalty under these statutes for a negligent violation of the statute that would not support a prosecution under criminal statutes designed to punish banking-related offenses. See pp. 45-46, *infra*. OCC's imposition of a civil penalty does not depend on a showing that the penalized conduct has *already* been punished under the criminal law. Cf. *Kurth Ranch*, 511 U.S. at 781 (finding dangerous-drug tax to be punitive because it applied only to conduct that was illegal under criminal law). Finally, the money penalty provisions in the banking statutes are "rationally * * * connected" to the regulatory goal of protecting the banking system from impairment, and money penalties are hardly an excessive sanction in relation to that goal. Especially in regulating economic activity, money penalties designed to remove a profit incentive from violations

are an apt way to encourage ongoing compliance with the law.

Thus, there is no sound basis for finding that the civil penalty provisions at issue here must be understood as invariably and inherently "punitive" for double jeopardy purposes. The imposition of a civil money penalty is limited by the requirements of the Due Process Clause, and its size may be subject to review under the Eighth Amendment's Excessive Fines Clause. Statutory limitations and judicial review provide further protection against arbitrary and oppressively large penalties. Given those safeguards, few if any regulatory civil penalty penalties will go beyond their legitimate deterrent purpose and will be transformed into punishment under double jeopardy analysis. Cf. *Ursery*, 116 S. Ct. at 2148 n.3. But even if some penalty of that extreme character would warrant relief under the Double Jeopardy Clause, there is no basis for finding that the $44,000 civil penalties assessed against petitioners under the banking regulatory scheme at issue here constituted "punishment" rather than a reasonable regulatory sanction. Thus, those penalties do not foreclose all efforts to prosecute petitioners criminally for the same conduct.

B. IF CIVIL REGULATORY PENALTIES ARE SUBJECT TO *HALPER*, THE CIVIL ASSESSMENTS AGAINST PETITIONERS WERE REMEDIAL BECAUSE THEY REASONABLY REIMBURSED THE GOVERNMENT FOR ITS INVESTIGATIVE AND ADMINISTRATIVE COSTS

Even if it were appropriate to apply *Halper*'s case-specific analysis here, the civil penalties paid by petitioners would not constitute "punishment." Those penalties, viewed objectively, served a valid remedial purpose: they reimbursed the government for its costs of investigating petitioners' violations of the banking laws—which investigation also led to the remedial sanction of debarment from banking activities. The evidence introduced in the district court established that the government's investigative costs were approximately $72,000 (Pet. App. 3a), an amount exceeding the total of the penalties assessed on all three petitioners. Because petitioners were not punished a *first* time when they paid penalties less than those investigatory costs, they will not be punished a *second* time in this criminal case.

1. In *Halper*, the Court stated that

> [w]here a defendant has previously sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.

490 U.S. at 449-450. In *Ursery*, the Court described the method for applying *Halper*'s case-specific test by observing that "[w]hether a 'fixed-penalty provision' that

seeks to compensate the Government for harm it has suffered is 'so extreme' and 'so divorced' from the penalty's nonpunitive purpose of compensating the Government as to be a punishment may be determined by balancing the Government's harm against the size of the penalty." 116 S. Ct. at 2145. Thus, if *Halper* is applicable here, its test requires a comparison between the harm to the government and the size of the penalty.

Halper also makes clear that, in comparing the harm to the government with the penalty imposed on a defendant, a court must "factor in[]" "the Government's investigative and prosecutorial costs." 490 U.S. at 446 n.6. In that respect, *Halper* followed the Court's prior cases that have addressed whether assessment of a nominally civil monetary penalty implicates the Double Jeopardy Clause. For example, in *Helvering* v. *Mitchell*, 303 U.S. at 401, the Court held that a 50% civil penalty assessed for fraudulent evasion of income taxes was remedial because it "was provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud." Similarly, in *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 237 (1972), the Court held a forfeiture provision to be remedial in part because it "serve[d] to reimburse the Government for investigation and enforcement expenses." See also *Kurth Ranch*, 511 U.S. at 777 ("a so-called civil 'penalty' may be remedial in character if it merely reimburses the government for its actual costs arising from the defendant's criminal conduct"); *id.* at 794-795 (O'Connor, J., dissenting).[19]

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[19] Petitioners argue (Pet. Br. 31-32) that the government's effort to justify the penalties in this case based on its investigative costs was developed only after the penalties were assessed. Under *Halper*, however, the government is not required to justify the size of the penalty at all until the defendant makes a preliminary showing that the civil penalty "appears to qualify as 'punishment'" because it bears no rational relation to compensation of the government for its costs and damages. See 490 U.S. at 449. Indeed, in *Halper*, the Court remanded the case to permit the government to prove its actual costs arising from Halper's fraud, even though the government had previously not challenged the district court's conclusion that the amount of the penalty was not related to the government's expenses. *Id.* at 452.

Halper requires only an objective comparison of the government's costs with the penalties imposed. It "does not authorize courts to undertake a broad inquiry into the subjective purposes that may be thought to lie behind a given judicial proceeding. * * * Such an inquiry would be amorphous and speculative, and would mire the courts in the quagmire of differentiating among the multiple purposes that underlie every proceeding, whether it be civil or criminal." *Halper*, 490 U.S. at 453 (Kennedy, J., concurring). Thus, under *Halper*, the relevant inquiry should be whether the civil penalty grossly exceeds the costs and damages that the government is able to prove—even if the government's purposes in imposing the civil penalty did not include such compensation. A rule that disregarded such costs where they were not expressly considered would provide a double-jeopardy windfall when the size of the actual penalty does no more than compensate for harm. *Halper* does not require that result.

2. Petitioners acknowledge that payments to the government for the costs of enforcement can be remedial when the government seeks compensation for a financial harm that it has suffered, but they assert that such penalties cannot be remedial when the government acts to ferret out and correct harms done to others, including the public at large. They argue that "the Court has never * * * sustained as 'remedial' a sanction that did not actually 'remedy' a harm to the government, but merely

covered the costs of investigating *harms caused to other parties*." Pet. Br. 29. [20]

There is no basis for petitioners' distinction between the costs of government's investigation of damage done to its financial interests, and the costs of the government's investigation of harm done to the public. Petitioners' conduct injured the integrity of the federal banking system by contributing to the failure of two banks.[21] Such serious impairments of the government's programmatic concern for the safety and soundness of the banking system are injuries to the government in its role as protector of the public interest. See *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 153 (1956) (noting that the case involved "injury to the Government" because the defendants' actions interfered with the purposes of the surplus property program by "preclud[ing] bona fide sales to veterans" and "promot[ing] undesirable speculation").

Relying on *S.A. Healy & Co.* v. *OSHRC*, 96 F.3d 906 (7th Cir. 1996), petition for cert. pending, No. 96-1299 (filed Feb. 13, 1997), petitioners argue (Pet. Br. 31) that, if reimbursing the government for its costs in enforcing the law against others were a remedial purpose, then all monetary penalties, including those imposed in criminal cases, would avoid scrutiny under the Double Jeopardy Clause as "remedial" sanctions. The Court has recognized, however,

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[20] Petitioners also argue that treating payments for the costs of enforcement as remedial constitutes "fee shifting" in violation of the "American Rule" that the parties to litigation bear their own attorneys' fees. That argument is without merit. The sanction against petitioners is not "fee shifting"; it is remedial because it recovers the costs to the government caused by petitioners' improper conduct. In any event, *Mitchell*, *One Lot Emerald Cut Stones*, and *Halper* have squarely held that such costs may be considered remedial.

[21] Those bank failures caused a loss to the Federal Deposit Insurance Fund. Pet. App. 97a. Thus, it is inaccurate to say that the government did not suffer a financial injury in this case.

that "both punitive and remedial goals may be served by criminal penalties." *Halper*, 490 U.S. at 447; cf. *Helvering* v. *Mitchell*, 303 U.S. at 402 n.6 ("nothing in the Constitution prevents the enforcement of distinctly remedial sanctions by a criminal instead of a civil form of proceeding"). The Double Jeopardy Clause is principally directed against abuse of the criminal process, because criminal law *inherently* involves punishment (whatever else it may involve), and because criminal prosecutions impinge on individual liberty in a unique way. A civil sanction that serves only to make the government whole does not implicate those concerns, even if the sanction was calibrated to achieve other objectives.[22]

C. THE IMPOSITION OF CIVIL PENALTIES DOES NOT CONSTITUTE A "JEOPARDY" THAT MAY BAR LATER CRIMINAL PROSECUTION

1. Petitioners' double jeopardy claim fails for an additional reason: petitioners may not raise a defense of a former jeopardy because the concept of jeopardy does not encompass payment of civil money penalties. Rather, "jeopardy" refers only to the specific risks associated with a criminal trial.

In light of the history of the Double Jeopardy Clause, the Court has interpreted "jeopardy" to involve the dan-

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[22] Petitioners also contend that the government should not be allowed to rely on an allocation of the salaries and benefits of OCC employees assigned to investigate and prosecute their conduct because the government is contractually bound to pay those salaries and benefits anyway. The government's need to retain such employees, however, results from the existence of violators such as petitioners. Petitioners also argue, relying on Judge Noonan's dissenting opinion in *United States* v. *Walker*, 940 F.2d 442 (9th Cir. 1991), that the court of appeals' rationale would justify assessing a violator with a *pro rata* share of the cost of the entire government. In this case, however, the government relied only on the amount that one agency had expended in investigating petitioners' conduct.

gers associated with the actual trial of a criminal case. "Jeopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution." *Breed* v. *Jones*, 421 U.S. at 528; see *Serfass* v. *United States*, 420 U.S. 377, 391 (1975) ("Both the history of the Double Jeopardy Clause and its terms demonstrate that it does not come into play until a proceeding begins before a trier 'having jurisdiction to try the question of the guilt or innocence of the accused.' "); *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 548-549 (1943) (" 'jeopardy' within the constitutional meaning" refers to the risks associated with "actions intended to authorize criminal punishment"). The Clause's focus on criminal prosecutions responds to the unique role and consequences of criminal sanctions in our society. A conviction represents the societal judgment that a person is a criminal and subjects that person to stigma that is unmatched by any other assertion of governmental power. See *Breed* v. *Jones*, 421 U.S. at 531; see also *Price* v. *Georgia*, 398 U.S. 323, 331 n.10 (1970).

In *Halper*, the Court found a violation of the Clause in the imposition of punitive civil fines on a defendant "who already ha[d] been punished in a criminal prosecution." 490 U.S. at 448-449. *Halper*'s rule was carefully limited to civil punitive fines that *follow* a completed criminal prosecution. As the Court stated, "the only proscription established by our ruling is that the Government may not criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action based on the same conduct and receive a judgment that is not rationally related to the goal of making the Government whole." *Id.* at 451.

The Court's later decision in *Kurth Ranch* arose in a posture similar to that of *Halper*: after the State completed its criminal proceedings against the defendants, it assessed a tax on dangerous drugs. The Court concluded

that the dangerous-drug tax was punitive in all its applications, and was therefore "not the kind of remedial sanction *that may follow the first punishment of a criminal offense*. Instead, it is a second punishment within the contemplation of [the] constitutional protection" against multiple punishment. 511 U.S. at 784 (emphasis added). The Court noted that the case "[did] not raise the question whether an ostensibly civil proceeding that is designed to inflict punishment may bar a subsequent proceeding that is admittedly criminal in character," *id.* at 781 n.21. *Kurth Ranch* therefore expressly left open the issue in this case.

Halper rested on a distinct branch of double jeopardy doctrine that protects defendants against multiple punishments for the same offense. See *Halper*, 490 U.S. at 440 (quoting *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873)). In *Lange*, the Court relied in part on the Double Jeopardy Clause to hold that, when the legislature has authorized the imposition of two alternative criminal punishments, the defendant's service of either sentence precludes the sentencing court from imposing the other. The Court reasoned that the Clause's protection would be of little value "if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time." 85 U.S. (18 Wall.) at 173.

In light of the reasoning of *Lange*, the Court has interpreted the multiple punishments doctrine to protect "against additions to a sentence in a subsequent proceeding that upset a defendant's legitimate expectation of finality" in a completed criminal proceeding. *Jones* v. *Thomas*, 491 U.S. 376, 385 (1989); *United States* v. *Wilson*, 420 U.S. 332, 343 (1975). *Halper* extended that principle to protect the defendant's interest in finality against punitive civil sanctions. The Court explained in *Halper*

that the rule it announced protected the defendant against an unexpected and improper "addition" to his criminal sentence: "That the Government seeks the civil penalty in a second proceeding is critical in triggering the protections of the Double Jeopardy Clause. * * * [W]hen the Government has already imposed a criminal penalty and seeks to impose additional punishment in a second proceeding, the Double Jeopardy Clause protects against the possibility that the Government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding." 490 U.S. at 451 n.10. Thus, once the government has obtained a conviction and sentence through the criminal process, it may not impose an additional punishment for the same offense, whether that additional punishment be explicitly criminal, as in *Lange*, or nominally civil but punitive in effect, as in *Halper*.

But while *Halper* extended the multiple punishments principle to embrace a civil-but-punitive addition to a sentence, it did not hold that a civil proceeding that results in the assessment of penalty (even a punitive one) is a "jeopardy" that might bar later criminal prosecution. Nor does *Halper* imply that punitive civil penalties constitute a separate and distinct "jeopardy." From the inception of the multiple-punishments doctrine in *Lange*, that doctrine has applied to punishments meted out in a single, criminal proceeding—in which there is plainly only one "jeopardy."

There is no anomaly in concluding that *Halper* applies only to the imposition of civil penalties *after* completed criminal prosecutions, but does not affect prosecutions following completed civil penalty proceedings. That difference reflects the very concerns articulated by the Court in *Halper*. When the government seeks to impose a punitive civil penalty after a criminal conviction, there may be a risk that the additional punishment is sought because of dissatisfaction with the sentence. *Halper*, 490

U.S. at 451 n.10. When the government has not yet prosecuted a defendant, however, pursuit of criminal charges does not imply a belief that a particular civil sanction was inadequate. Rather, a criminal prosecution represents the judgment that *no* civil sanction is adequate to address the culpability of particular conduct. Because petitioners have not been subjected to the hazards of a criminal trial for their banking violations, they have not been subjected to jeopardy at all. They also have no expectation of finality in a criminal sentence, for none has been entered against them. Accordingly, *Halper*'s protection against punitive additions to criminal sentences has no application here.

2. If, contrary to our submission, a double jeopardy violation could be threatened by a criminal prosecution following a "punitive" civil penalty, the remedy should not be, as petitioners' contend (Pet. Br. 12), dismissal of the indictment altogether. This Court's cases indicate that a double jeopardy violation, like other constitutional violations, must be remedied only to the extent of the injury suffered. See, *e.g.*, *Jones* v. *Thomas*, 491 U.S. at 380-387; *Morris* v. *Mathews*, 475 U.S. 237, 247 (1986). A defendant who prevails on a *Halper* claim has not shown a violation of the multiple prosecutions prong of double jeopardy law; accordingly, such a defendant should not generally be entitled to foreclose the second proceeding entirely if there is a mechanism to avoid impermissible double punishment. See *id.* at 246-247 (reducing second conviction to offense that was not jeopardy-barred).

Here, an appropriate mechanism exists: a defendant may be given "credit" in any eventual criminal sentence for any punishment imposed by the payment of civil penalties. A "credit" for prior punishment could directly offset a criminal fine with the prior payments, or otherwise reduce the sentence. See *Jones* v. *Thomas*, 491 U.S. at 381-382 (defendant improperly sentenced to consecutive sentences for robbery and felony murder had his interest in avoiding

multiple punishment "fully vindicated" by vacating the attempted robbery conviction and sentence and crediting the time served for robbery against the longer sentence for felony murder); *Witte* v. *United States*, 515 U.S. 389, 404-406 (1995) (noting authority of sentencing court to adjust sentence to reflect prior punishment in a related proceeding). A precise credit may not be possible in all cases, but, in general, a credit approach would provide a more measured remedy for a *Halper* violation predicated on a prior civil money penalty than would complete foreclosure of any opportunity to vindicate the criminal law.

D. EVEN IF PETITIONERS WERE PUNISHED BY THE CIVIL ASSESSMENT, THEY WERE NOT PUNISHED FOR THE "SAME OFFENSES" AS THOSE CHARGED IN THE INDICTMENT

1. In *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), this Court stated that two offenses are not the "same" for purposes of the Double Jeopardy Clause if "each [offense] requires proof of a fact which the other does not." See also *United States* v. *Dixon*, 509 U.S. 688, 696 (1993) (test is "whether each offense contains an element not contained in the other"). The *Blockburger* test focuses on the elements of the offenses at issue, not the specific acts charged by the government to satisfy those offenses or the actual proof at trial. Under that test, the administrative proceeding and the criminal prosecution in this case do not involve the same offense.[23]

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[23] The petition for a writ of certiorari did not ask the Court to consider whether the criminal and civil sanctions involve the "same offense," but presented only the question whether the civil penalties should be characterized as punitive or remedial. See Pet. I. Nevertheless, as the prevailing party, the government is entitled to defend the judgment on any ground preserved below. *Massachusetts Mutual Life Ins. Co.* v. *Ludwig*, 426 U.S. 479, 481 (1976) (per curiam); *Langnes* v. *Green*, 282 U.S. 531, 536-539 (1931). Because the court of appeals did not reach the issue, however, the Court may wish to remand for consideration of that issue if it otherwise accepts petitioners' double jeopardy claim. See *Wilson* v. *Arkansas*, 514 U.S. 927, 937 (1995).

Petitioners argue, however, that *Blockburger* does not provide the appropriate test in cases like this one to determine whether the offenses are "the same." They contend that the Court has articulated a same-conduct, rather than same-elements, test, in its successive-punishment cases. That contention cannot be sustained.

Blockburger itself was a multiple-punishments case. The defendants contended there that Congress did not intend for them to be punished for a single sale of narcotics under two different statutes, but the Court concluded that the two statutes were not the same offense, as "[e]ach of the offenses created requires proof of a different element." 284 U.S. at 304. Since *Blockburger*, the Court has reaffirmed that the elements test governs multiple-punishment claims. See *Rutledge* v. *United States*, 116 S. Ct. 1241, 1245 (1996); *Ball* v. *United States*, 470 U.S. 856, 861 (1985); *Whalen* v. *United States*, 445 U.S. 684, 691 (1980); *Brown* v. *Ohio*, 432 U.S. 161, 166-168 (1977); see also *Dixon*, 509 U.S. at 704. Moreover, in *Witte*, *supra*, the Court indicated that *Blockburger* should apply in *successive* punishments cases such as this one. *Witte* involved a claim that the use in sentencing of conduct that had formed the basis of a previous conviction constituted multiple punishment. The Court observed that "the same [*Blockburger*] inquiry generally applies in both the multiple punishment and multiple prosecution contests." 515 U.S. at 396 (internal quotation marks and brackets omitted).

Application of *Blockburger* to successive-punishment claims is consistent with sound constitutional doctrine. If

(as the Court has held, see *Dixon*, 509 U.S. at 704), there is no basis for applying a test to successive-prosecution claims that is different from the test applied to claims of multiple punishments imposed at the same trial, then there surely can be no basis for applying a test to *successive*-punishment claims that is different from the test applied in both those other contexts. Indeed, it is difficult to see how the courts could apply one test (the *Blockburger* test) to determine whether a successive prosecution may go forward but apply some other test (such as a same-conduct test) to determine whether successive punishment may be applied in that prosecution. And attempts to define the "same offense" by reference to a "same conduct" or "same transaction" test have been rejected by the Court as unsound and unworkable. *Dixon*, 509 U.S. at 709-711 (overruling "same conduct" test of *Grady* v. *Corbin*, 495 U.S. 508 (1990), as "wrong in principle" and "unstable in application"); 509 U.S. at 709 n.14 ("Of course, the same-transaction test * * * has been consistently rejected by the Court.") (citations omitted).[24]

Petitioners argue (Br. 37-39) that in *Kurth Ranch*, *Halper*, and *United States* v. *La Franca*, 282 U.S. 568 (1931), the Court articulated a "same conduct" test for successive-punishment claims. In *Kurth Ranch*, however, the Court expressly declined to consider the State's argument that its tax on the possession of illegal drugs did not punish the same conspiracy offense to which five of the

[24] In *Kansas* v. *Hendricks*, 117 S. Ct. 2072 (1997), the Court, in the course of rejecting a double jeopardy claim, stated that "[t]he *Blockburger* test * * * simply does not apply outside of the successive prosecution context." *Id.* at 2086. That sentence should not be read as holding that some other test, such as a same-conduct test, applies to successive-punishment claims. In context, the Court in *Hendricks* simply rejected the conclusion that the civil commitment proceedings at issue there constituted an "offense" subject to double jeopardy "element" analysis.

defendants had pleaded guilty. 511 U.S. at 772 n.9. Thus, although the Court referred to the case as involving a tax and a criminal penalty "for the same conduct," *id.* at 769, it did not articulate a same-conduct rule for successive-punishment claims. In *Halper*, the district court granted summary judgment for the government on liability based on Halper's criminal conviction, see 490 U.S. at 438, and the government did not argue in this Court that the criminal and civil provisions of the False Claims Act were not the "same offense."

In *La Franca*, which was decided before *Blockburger*, the Court construed Section 5 of the Willis-Campbell Act, ch. 134, 42 Stat. 221, to permit prosecution of an act involving illegal liquor sales under either the National Prohibition Act, ch. 85, 41 Stat. 305, or any statute preexisting the Prohibition Act, but not both. See 282 U.S. at 575. The Court remarked that, if it were to construe the Willis-Campbell Act to permit both prosecution of liquor sales under the Prohibition Act and recovery of statutory penalties and taxes under the Revenue Act of 1918, ch. 18, 40 Stat. 1057 (reenacted in 1924, ch. 234, 43 Stat. 253), a "grave question" of constitutionality would be presented. 282 U.S. at 574. The Court also referred to two lower-court decisions that barred successive prosecutions under two different statutes for the same transactions, even though the two statutes might not have defined the "same offense" under *Blockburger*.[25] The fact that the Court

[25] See 282 U.S. at 574 (discussing *United States* v. *McKee*, 26 F. Cas. 1116 (C.C.E.D. Mo. 1877) (No. 15,688) and *United States* v. *Gates*, 25 F. Cas. 1263 (S.D.N.Y. 1845) (No. 15,191)). *La Franca* also relied (282 U.S. at 573-574) on *United States* v. *Chouteau*, 102 U.S. 602 (1880), but that case is clearly inapposite here. In *Chouteau*, the government and the defendant entered into a settlement of a criminal case, by which the defendant agreed to pay a statutory penalty; the government subsequently sought to collect the same penalty from the defendant's surety. The Court held that the government could not seek

recognized the existence of a constitutional *question* in the case, however, does not mean that it necessarily believed that the Double Jeopardy Clause would have been violated by the two proceedings. Accordingly, *La Franca* does not dictate that a same-conduct, rather than same-elements, test, governs successive-punishment claims of double jeopardy.

2. Application of *Blockburger* leads to the conclusion that petitioners cannot meet the "same offense" requirement of the Double Jeopardy Clause. In the administrative proceeding, OCC relied on its authority under 12 U.S.C. 93 and 504 (1982) to assess monetary sanctions against the defendants for violations of 12 U.S.C. 84 and 375b (1982) and 12 C.F.R. 31.2 and 215.4 (1986). To establish a violation of 12 U.S.C. 84, OCC must show that (1) the total loans and extensions of credit (2) from a national banking association (3) exceeded 15% of the unimpaired capital of the bank if the loans are unsecured or 10% of the unimpaired capital if the loans are secured. A violation of 12 U.S.C. 375b and 12 C.F.R. 31.2(b) and 215.4(b) occurs when (1) a national bank (2) extends credit to an executive officer, director, principal shareholder, or company controlled by such a person, (3) in an amount that exceeds 5% of the bank's capital and unimpaired surplus (4) unless a majority of the bank's board of directors grants prior approval in a vote in which the interested party abstains.[26]

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to recover the penalty a second time because "the compromise pleaded covers the penalties here claimed." *Id.* at 610.

[26] Section 375b(2) imposes limitations on loans in an amount that exceeds the amount prescribed "in a regulation of the appropriate Federal banking agency." OCC and the Federal Reserve Board promulgated the implementing regulations in 12 C.F.R. 31.2(b) and 215.4(b) respectively. Although the two regulations differ slightly in their wording, they have the same import and effect. See pp. 15a-17a, *infra*.

Even under the assumption that a civil provision can define an "offense," none of these provisions is the same offense as any of those charged in the indictment.[27] First, the conspiracy offense defined by 18 U.S.C. 371 is not the "same offense" as the banking statutes and regulations violated by petitioners. To prove a violation of Section 371, the government must show that the conspirators agreed to commit the object offenses, and that an overt was committed in furtherance of the conspiracy. None of the banking provisions requires the government to prove an agreement to violate federal law. Moreover, "a substantive crime and a conspiracy to commit that crime are not the 'same offence' for double jeopardy purposes." *United States* v. *Felix*, 503 U.S. 378, 389 (1992).

The offense defined by 18 U.S.C. 656 also is not the same as the "offenses" defined by the civil banking provisions in Title 12. The civil banking provisions prohibit bank officers from making any loans to any single borrower beyond certain capital limits and from making unauthorized loans to insiders beyond other capital limits. A violation of those restrictions may be established without proof of intent; a negligent infraction of the lending limits will violate 12 U.S.C. 84 and 375b. And under 12 U.S.C. 93(b) and 504, the Comptroller may impose a civil penalty for violations of 12 U.S.C. 84 and 375b without finding that the responsible party acted willfully and with fraudulent intent.

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[27] Petitioners appear to acknowledge that prosecution of Rackley under 18 U.S.C. 1005 would be permitted under the *Blockburger* test. See Pet. Br. 41-44. A Section 1005 charge requires proof that the defendant made a false entry in the records of a federally protected bank. None of the banking provisions at issue here contains that element, but each of those provisions requires proof of elements not present in Section 1005 (such as proof that a loan exceeded a lending limit, or was made to a bank insider).

By contrast, Section 656 prohibits willful misapplication of bank funds with the intent to defraud the bank or federal regulators.[28] See *United States* v. *Haddock*, 961 F.2d 933, 934-935 (10th Cir.), cert. denied, 506 U.S. 828 (1992); *United States* v. *Unruh*, 855 F.2d 1363, 1368 (9th Cir. 1987), cert. denied, 488 U.S. 974 (1988); *United States* v. *Arthur*, 544 F.2d 730, 736 (4th Cir. 1976); *United States* v. *Giordano*, 489 F.2d 327, 330 (2d Cir. 1973). Section 656 thus requires proof of mental state elements not required by the civil banking provisions. The banking provisions also contain essential elements that Section 656 lacks, such as proof that a loan exceeded applicable lending limits (in both provisions), and was made to an insider without board authorization (in the case of Section 375b). Neither of these elements is necessary to proof of misapplication in violation of Section 656; a violation of Section 656 may be predicated on any of a wide array of practices, such as check-kiting, diversion of bank proceeds to bribes, and knowingly honoring checks drawn without sufficient funds.[29] In this case, the government could prove a violation of Section 656 by showing that petitioners knowingly made loans to nominees who would not actually

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[28] We assume for purposes of this case that proof of intent to injure or defraud is required to establish the misapplication offense under Section 656, even though that is not a textual requirement of the statute. Compare *Bates* v. *United States*, No. 96-7185 (to be argued Oct. 7, 1997), in which the question presented is whether intent to injure or defraud the government is an element of 20 U.S.C. 1097(a), and see 96-7185 U.S. Br. at 26-27, discussing lower-court constructions of Section 656. Whether or not proof of intent to defraud is required would not affect the outcome of the *Blockburger* analysis in this case.

[29] See, *e.g.*, *Haddock*, *supra* (check-kiting); *Unruh*, *supra* (check-kiting and loans to uncreditworthy borrowers); *Arthur*, *supra* (alleged use of bank funds for bribes); *Giordano*, *supra* (check-kiting); *Logsdon* v. *United States*, 253 F.2d 12 (6th Cir. 1958) (honoring check drawn without sufficient funds).

control the loan proceeds, without showing that those loans exceeded the banks' lending limits or were made for the benefit of a bank insider. Thus, because misapplication of bank funds does not always require proof of violation of lending limits or loans to insiders, the two offenses are not the "same" under the *Blockburger* test.[30]

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[30] Petitioners concede that "the banking statutes do not *invariably* require proof of the same elements as do the criminal statutes," but argue that the issue is whether "in the circumstances of this particular case, the civil sanctions in fact rested on the same elements." Pet. Br. 41. That contention is incorrect, see *United States* v. *Woodward*, 469 U.S. 105, 107 (1985) (per curiam), and it is not supported by the cases on which petitioners rely (Br. 42). The Court did not decide *Illinois* v. *Vitale*, 447 U.S. 410, 419 (1980), based on the State's "actual trial theory" (Pet. Br. 42). The Court reserved decision there on whether the Double Jeopardy Clause would be violated if "a careless failure to slow [for which Vitale had already been convicted] is *always* a necessary element of manslaughter" (for which he stood charged). 447 U.S. at 419-420 (emphasis added). If Vitale had shown that failure to slow was an element of *every* case of manslaughter by automobile, not just his own case, then he might have had a double jeopardy claim. Nor does *Whalen* v. *United States*, 445 U.S. 684 (1980), support petitioners' argument. There, the Court concluded that Congress had not intended for cumulative punishments to be imposed for rape and felony murder (the killing having occurred during the commission of the rape). *Whalen*, however, rests in large part on the unusual nature of felony murder, which may be committed in the course of many felonies. The Court has generally not treated felony murder "as a separate offense distinct from its various elements." See *Vitale*, 447 U.S. at 420 (discussing *Harris* v. *Oklahoma*, 433 U.S. 682 (1977) (per curiam)). Thus, in *Whalen*, the Court construed felony murder committed during rape as an offense different from that of felony murder committed during arson, and concluded that the rape was a lesser-included offense of the felony murder-during-rape. See 445 U.S. at 694; see also *Dixon*, 509 U.S. at 707 ("*Vitale* unquestionably reads *Harris* as merely an application of the double jeopardy bar to lesser and greater included offenses.").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Civil penalty provisions enacted by the Congress, 1789-1799

1. The first tonnage act, enacted July 31, 1789, provided a $500 penalty for a ship master who neglected to make certain entries in the ship's manifest. Act of July 31, 1789, ch. 5, § 11, 1 Stat. 39. See also § 12 ($400 penalty for unlading goods without a permit); § 25 (penalty for person who conceals goods subject to seizure, of double the value of the seizable goods); § 27 ($100 penalty for government officer who fails to post a rate of fees); § 36 ("That all penalties accruing by any breach of this act, shall be sued for and recovered with costs of suit, in the name of the United States, in any court proper to try the same.").

2. The statute establishing the first census provided a $20 penalty for false reporting by heads of households. Act of March 1, 1790, ch. 2 § 6, 1 Stat. 103. See also §§ 2, 3 (penalties for marshals and assistant marshals who fail to return their forms).

3. The first copyright statute provided a penalty of fifty cents a page for each page copied without permission. Act of May 31, 1790, ch. 15 § 2, 1 Stat. 124-125.

4. The statute creating the first Bank of the United States created a treble damages provision for corporations or persons making certain sales in violation of the act. Act of Feb. 25, 1791, ch. 10 § 8, 1 Stat. 195-196.

5. The act establishing duties on liquor importation created monetary penalties for illegal importation, for failing to make certain reports, and for false labelling of casks. Act of Mar. 3, 1791, ch. 15 §§ 9, 10, 27, 30, 1 Stat. 199-214.

6. The act prohibiting importing slaves provided a $2000 penalty for preparing a ship to engage in the slave trade and a $200 penalty for receiving persons on board to be sold as slaves. Act of Mar. 22, 1794, ch. 11 §§ 2,4, 1 Stat. 349.

7. Miscellaneous additional civil penalty provisions: Act of Sept. 1, 1789, ch. 11 § 24, 1 Stat. 61 ($200 penalty for sailing without a manifest); Act of July 20, 1790, ch. 29 § 4, 1 Stat. 133 ($10 penalty for harboring runaway seamen); Act of Aug. 4, 1790, ch. 35 § 13, 1 Stat. 157 ($1000 penalty for unlading goods without certification); Act of Mar. 3, 1791, ch. 15 § 10 ($500 penalty for importing liquor without a certificate); Act of Feb. 20, 1792, ch. 7, § 11, 1 Stat. 235 ($100 penalty for private letter carriers); Act of May 8, 1792, ch. 31 § 13, 1 Stat. 270 ($250 penalty for operating a still without a certificate); Act of May 8, 1792, ch. 39 § 2, 1 Stat. 284 ($10 penalty for using unminted copper coins); Act of Dec. 31, 1792, ch. 1 § 26, 1 Stat. 298 ($1000 penalty for government officers who charge unlawful fees); Act of Feb. 12, 1793, ch. 7 § 4, 1 Stat. 305 ($500 penalty for aiding escaped slaves); Act of Feb. 18, 1793, ch. 8 § 3, 1 Stat. 306 ($100 penalty for ship master who fails to register fishing ship); Act of Mar. 2, 1793, ch. 34 § 5, 1 Stat. 337 ($500 penalty for revenue officers who have personal interest in the importation of goods); Act of May 8, 1794, ch. 23 § 14, 1 Stat. 360 ($50 penalty for private letter carriers); Act

of June 5, 1794, ch. 48 § 2, 1 Stat. 377 ($50 penalty for selling wine without a license); Act of June 5, 1794, ch. 49 § 5, 1 Stat. 379 ($50 penalty for selling casks of liquor with defaced inspection marks); Act of June 5, 1794, ch. 51 § 4, 1 Stat. 385 ($500 penalty for manufacturing snuff or sugar without making report); Act of June 9, 1794, ch. 45 §3, 1 Stat. 398 ($400 penalty for auctioneers who fail to give a bond); Act of Feb. 26, 1795, ch. 31 § 1, 1 Stat. 420 ($50-500 penalty for obstructing inspection of importing vessel); Act of Mar. 3, 1795, ch. 43 § 7, 1 Stat. 428 (treble-duty penalty for manufacturing snuff without a license); Act of April 18, 1796, ch. 13 § 7, 1 Stat. 453 ($100 penalty for government agents who trade guns with Indians); Act of May 28, 1796, ch. 36 §6, 1 Stat. 478 ($100 penalty for ship masters who neglect to take oath of compliance with statute); Act of June 1, 1796, ch. 45 § 4, 1 Stat. 490 ($200 penalty for ship masters sailing without ship passport); Act of July 6, 1797, ch. 11 §4, 1 Stat. 528-529 ($20 penalty for insurers who neglect to make out policy for ships); Act of Jan. 23, 1798, ch. 8 § 3, 1 Stat. 537 ($20 penalty for witnesses failing to respond to summons); Act of Apr. 7, 1798, ch. 28 § 7, 1 Stat. 550 ($300 penalty for bringing slaves into Mississippi); Act of June 18, 1798, ch. 54 § 3, 1 Stat. 567 ($10 penalty on clerks who neglect to issue naturalization certificate); Act of June 25, 1798, ch. 58 § 3, 1 Stat. 571 ($300 penalty for ship masters who neglect to report aliens on board); Act of July 9, 1798, ch. 70 § 14, 1 Stat. 587 ($100 penalty for slaveowners neglecting to provide an enumeration of slaves); Act of July 16, 1798, ch. 77 § 2, 1 Stat. 606 ($100 penalty for ship master falsely reporting the number of seamen employed); Act of Feb. 28, 1799, ch. 17 § 2, 1 Stat. 622-623 (maximum $100 penalty for signing foreign bills without a

proper stamp); Act of Mar. 2, 1799, ch. 22 § 30, 1 Stat. 651 ($1000 penalty for ship master neglecting to make certain reports); Act of Mar. 2, 1799, ch. 43 § 12, 1 Stat. 735 ($50 penalty for private letter carriers).

APPENDIX B

1. Section 84 of Title 12, United States Code (1982 ed.) provided, in pertinent part:

§ 84. Lending limits

(a) Total loans and extensions of credit

(1) The total loans and extensions of credit by a national banking association to a person outstanding at one time and not fully secured, as determined in a manner consistent with paragraph (2) of this subsection, by collateral having a market value at least equal to the amount of the loan or extension of credit shall not exceed 15 per centum of the unimpaired capital and unimpaired surplus of the association.

(2) The total loans and extensions of credit by a national banking association to a person outstanding at one time and fully secured by readily marketable collateral having a market value, as determined by reliable and continuously available price quotations, at least equal to the amount of the funds outstanding shall not exceed 10 per centum of the unimpaired capital and unimpaired surplus of the association. This limitation shall be separate from and in addition to the limitation contained in paragraph (1) of this subsection.

(b) Definitions

For the purposes of this section—

(1) the term "loans and extensions of credit" shall include all direct or indirect advances of funds to a person made on the basis of any obligation of that person to repay the funds or repayable from specific property pledged by or on behalf of the person and, to

the extent specified by the Comptroller of the Currency, such term shall also include any liability of a national banking association to advance funds to or on behalf of a person pursuant to a contractual commitment; and

(2) the term "person" shall include an individual, sole proprietorship, partnership, joint venture, association, trust, estate, business trust, corporation, sovereign government or agency, instrumentality, or political subdivision thereof, or any similar entity or organization.

* * * * *

(d) Authority of Comptroller of the Currency

(1) The Comptroller of the Currency may prescribe rules and regulations to administer and carry out the purposes of this section including rules or regulations to define or further define terms used in this section and to establish limits or requirements other than those specified in this section for particular classes or categories of loans or extensions of credit.

(2) The Comptroller of the Currency also shall have authority to determine when a loan putatively made to a person shall for purposes of this section be attributed to another person.

2. Section 93 of Title 12, United States Code (1982 ed.) provided, in pertinent part:

§ 93. Violations of provisions of chapter; forfeiture of franchise; personal liability of directors; civil money penalty

(a) If the directors of any national banking association shall knowingly violate, or knowingly permit

any of the officers, agents, or servants of the association to violate any of the provisions of this chapter, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper district or Territorial court of the United States in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation.

(b)(1) Any national banking association which, and any institution-affiliated party (within the meaning of section 1813(u) of this title) with respect to such association who, violates any provision of this chapter or any of the provisions of section 92a of this title, or any regulation issued pursuant thereto, shall forfeit and pay a civil penalty of not more than $5,000 for each day during which such violation continues. The penalty may be assessed and collected by the Comptroller of the Currency by written notice. As used in the section, the term "violates" includes without any limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

(2) In determining the amount of the penalty the Comptroller shall take into account the appropriateness of the penalty with respect to the size of financial resources and good faith of the association or person charged, the gravity of the violation, the

history of previous violations, and such other matters as justice may require.

* * * * *

(6) The Comptroller may, in his discretion compromise, modify, or remit any civil money penalty which is subject to imposition or has been imposed under this section.

(7) The Comptroller shall promulgate regulations establishing procedures necessary to implement this subsection.

3. Section 375b of Title 12, United States Code (1982 ed.) provided, in pertinent part:

§ 375b. Prohibitions respecting loans and extensions of credit to executive officers and directors of banks, political or campaign committees, etc.

(1) No member bank shall make any loan or extension of credit in any manner to any of its executive officers, or to any person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of such member bank, except in the case of such a bank located in a city, town, or village with less than thirty thousand in population, in which case such per centum shall be 18 per centum, or to any company controlled by such an executive officer or person, or to any political or campaign committee the funds or services of which will benefit such an executive officer or person or which is controlled by such an executive officer or person, where the amount of such loan or extension of credit, when aggregated with the

amount of all other loans or extensions of credit then outstanding by such bank to such executive officer or person and to all companies controlled by such executive officer or person and to all political or campaign committees the funds or services of which will benefit such executive officer or person or which are controlled by such executive officer or person, would exceed the limits on loans to a single borrower established by section 84 of this title. For purposes of this paragraph, the provisions of section 84 of this title shall be deemed to apply to a State member bank as if such State member bank were a national banking association.

(2) No member bank shall make any loan or extension of credit in any manner to any of its executive officers or directors, or to any person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of such member bank, or to any company controlled by such an executive officer, director, or person, or to any political or campaign committee the funds or services of which will benefit such executive, director, or person or which is controlled by such executive officer, director, or person, where the amount of such loan or extension of credit, when aggregated with the amount of all other loans or extensions of credit then outstanding by such bank to such executive officer, director, or person and to all companies controlled by such executive officer, director, or person or which are controlled by such executive officer, director, or person, would exceed an amount prescribed in a regulation of the appropriate Federal banking agency, unless such loan, line of

credit, or extension of credit is approved in advance by a majority of the entire board of directors with the interested party abstaining from participating directly or indirectly in the voting.

(3) No member bank shall make any loan or extension of credit in any manner to any of its executive officers or directors, or to any person who directly or acting through or in concert with one or more persons, owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of such member bank, or to any company controlled by such executive officer, director, or person, or to any political or campaign committee the funds or services of which will benefit such executive officer, director, or person, or which is controlled by such executive officer, director, or person, unless such loan or extension of credit is made on substantially the same terms, including interest rates and collateral, as those prevailing at the time for comparable transactions with other persons and does not involve more than the normal risk of repayment or present other unfavorable features.

(4) No member bank may pay an overdraft on an account at such bank of an executive officer or director.

(5) For purposes of this section, an executive officer, director, or person shall be considered to have control of a company if such executive officer, director, or person, directly or indirectly or acting through or in concert with one or more other persons.

(A) owns, controls, or has power to vote 25 per centum or more of any class of voting securities of the company;

(B) controls in any manner the election of a majority of the directors of the company; or

(C) has the power to exercise a controlling influence over the management or policies of such company.

(6) For the purposes of this section—

(A) the term "person" means an individual or company;

(B) the term "company" means any corporation, partnership, business trust, association, joint venture, pool syndicate, sole proprietorship, unincorporated organization, any other form of business entity not specifically listed herein, or any other trust, but shall not include any insured bank or any corporation the majority of shares of which is owned by the United States or by any State;

(C) a person shall be deemed to be a "director" of a member bank or a "person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has power to vote more than 10 per centum of any class of voting securities of a member bank" if such person has such relationship with any bank holding company of which such member is a subsidiary, as defined by the Bank Holding Company Act (12 U.S.C. 1841), or with any other subsidiary of such bank holding company;

(D) a person shall be deemed to be an "officer" of a member bank if such person is an officer of any bank holding company of which such member bank is a subsidiary, as defined by the Bank Holding Company Act (12 U.S.C. 1841), or with any other subsidiary of such bank holding company;

(E) the term "executive officer" has the same meaning assigned such term under section 375a of this title; and

(F) the term "pay an overdraft on an account" means the payment by a member bank of an amount for an account holder in excess of the funds on deposit in the account and does not include a payment of funds by the member bank in accordance with either a written preauthorized, interest-bearing extension of credit specifying a method of repayment or a written preauthorized transfer of funds from another account of the account holder at that bank.

* * * * *

(7) The Board of Governors of the Federal Reserve System may prescribe such rules and regulations, including definitions of terms, as it deems necessary to effectuate the purposes and to prevent evasions of this section. The Board may further prescribe rules providing a reasonable period of time after November 10, 1978, within which the amount of outstanding loans or extensions of credit made prior to November 10, 1978, shall be reduced so as to conform to the limitations of this section.

4. Section 504 of Title 12, United States Code (1982 ed.) provided, in pertinent part:

§ 504. Civil penalty

(a) Making loans, extensions of credit, purchases of securities, etc., respecting affiliates, executive officers, etc.

Any member bank which violates or any officer, director, employee, agent, or other person participat-

ing in the conduct of the affairs of such member bank who violates any provision of section 371c, 375, 375a, 375b, 376, or 503 of this title, or any regulation issued pursuant thereto, shall forfeit and pay a civil penalty of not more than $1,000 per day for each day during which such violation continues: *Provided*, That the agency having authority to impose a civil money penalty may, in its discretion, compromise, modify, or remit any civil money penalty which is subject to imposition or has been imposed under such authority. The penalty may be assessed and collected by the Comptroller of the Currency in the case of a State member bank, by written notice. As used in this section, the term "violates" includes without any limitation any action (alone or with another or others) for or toward causing, bringing about participating in, counseling, or aiding or abetting a violation.

(b) Amount of penalty

In determining the amount of the penalty the Comptroller of the Currency or the Board, as the case may be, shall take into account the appropriateness of the penalty with respect to the size of the financial resources and good faith of the member bank or person charged, the gravity of the violation, the history of previous violations, and such other matters as justice may require.

5. Section 371 of Title 18, United States Code provides, in pertinent part:

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any

manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

6. Section 656 of Title 18, United States Code provides, in pertinent part:

§ 656. Theft, embezzlement, or misapplication by bank officer or employee

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, depository institution holding company, national bank, insured bank, branch or agency of a foreign bank, or organization operating under section 25 or section 25(a) of the Federal Reserve Act or a receiver of a national bank, insured bank, branch, agency, or organization or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank, branch, agency, or organization or holding company or any moneys, funds, assets or securities intrusted to the custody or care of such bank, branch, agency, or organization, or holding company or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined under this title or imprisoned not more than one year, or both.

7. Section 1005 of Title 18, United States Code provides, in pertinent part:

§ 1005. Bank entries, reports and transactions

Whoever makes any false entry in any book, report, or statement of such bank, company, branch, agency, or organization with intent to injure or defraud such bank, company, branch, agency, or organization, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, company, branch, agency, or organization, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent to examiner appointed to examine the affairs of such bank, company, branch, agency, or organization, or the Board of Governors of the Federal Reserve System;

Shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

8. Section 31.2 of Title 12, Code of Federal Regulations (1986 ed.), provided, in pertinent part:

§ 31.2 Loan limits.

(a) A national bank is authorized to extend credit (which term includes granting a line of credit) to an executive officer or purposes other than those specifically authorized under 12 U.S.C. 375a in an aggregate amount that does not exceed at any one time the higher of $25,000 or 2.5 per cent of the bank's capital and unimpaired surplus, but in no event more than $100,000.

(b) No national bank shall extend credit to any of its executive officers, directors, or principal shareholders or to any related interest of that person in an amount that, when aggregated with the amount of all

other extensions of credit to that person and to all related interests of that person, exceeds the higher of $25,000 or 5 per cent of the bank's capital and unimpaired surplus, unless: (1) The extension of credit has been approved in advance by a majority of the entire board of directors of that bank, and (2) the interested party has abstained from participating directly or indirectly in the vote. In no event shall a national bank extend credit to any of its executive officers, directors, or principal shareholders or to any related interest of that person in an amount that, when aggregated with the amount of all other extensions of credit to that person and all related interests of that person, exceeds $500,000, except by complying with the requirements in paragraphs (b)(1) and (2) of this section.

94. Section 215.4 of Title 12, Code of Federal Regulations (1986 ed.), provides, in pertinent part:

§ 215.4 General prohibitions.

(a) *Terms and creditworthiness.* No member bank may extend credit to any its executive officers, directors, or principal shareholders or to any related interest of that person unless the extension of credit:

(1) Is made on substantially the same terms, including interest rates and collateral, as those prevailing at the time for comparable transactions by the bank with other persons that are not covered by this part and who are not employed by the bank, and (2) does not involve more than the normal risk of repayment or present other unfavorable features.

(b) *Prior approval.* (1) No member bank may extend credit (which term includes granting a line of credit) to any of its executive officers, directors, or

principal shareholders or to any related interest of that person in an amount that, when aggregated with the amount of all other extensions of credit to that person and to all related interests of that person, exceeds the higher of $25,000 or 5 percent of the member bank's capital and unimpaired surplus, unless:

(i) The extension of credit has been approved in advance by a majority of the entire board of directors of that bank, and (ii) the interested party has abstained from participating directly or indirectly in the voting. In no event may a member bank extend credit to any one of its executive officers, directors, or principal shareholders, or to any related interest of that person, in an amount that, when aggregated with all other extensions of credit to that person, and all related interests of that person, exceeds $500,000, except by complying with the requirements of this paragraph.

(2) Approval by the board of directors under paragraph (b)(1) of this section is not required to an extension of credit that it made pursuant to a line of credit that was approved under paragraph (b)(1) of this section within 14 months of the date of the extension of credit. The extension of credit must also be in compliance with the requirements of § 215.4() of this part.

(3) Participation in the discussion, or any attempt to influence the voting, by the board of directors regarding an extension of credit constitutes indirect participation in the voting by the board of directors on an extension of credit.